IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. NELSON TROGLIN

Direct Appeal from the Circuit Court for Bledsoe County
No. 41-1999 Thomas W. Graham, Judge

No. E2005-02015-CCA-R3-CD - Filed September 14, 2006

The Defendant, Nelson Troglin, was convicted of attempted first degree murder, and the trial court sentenced him to twenty-four years in the Department of Correction. On appeal, the Defendant contends that the trial court erred when it: (1) refused to strike prospective jurors; (2) did not instruct jurors on the charge of aggravated assault as a lesser-included offense; (3) refused the Defendant's request for a mental evaluation; (4) denied the motions to replace Defendant's counsel, which caused the Defendant to receive ineffective assistance of counsel; and (5) improperly allowed references to the Defendant's indictment for the murder of Ralph Wilkey. Finding no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

C. Douglas Fields, Crossville, Tennessee (on appeal) and Jeffrey Harmon, Jasper, Tennessee (at trial), for the appellant, Nelson Troglin.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; James Michael Taylor, District Attorney General; James W. Pope III, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the attempted murder of the victim, Mike Stafford. At the Defendant's trial, the State and the Defendant stipulated to the following:

> If Jamey Roberson, the Circuit Court Clerk, was called to testify, Your Honor, he would testify that his occupation, he is the Circuit Court Clerk; that its's his duty to file pleadings in court cases, such as indictments and so forth; that he would testify

> that [the Defendant] was indicted for the homicide of Ralph Wilkey on July 27, 1998, by the Bledsoe Grand Jury.
>
> He would also testify that that case on March 16, 1999, was set for trial for September 21, 1999. He would also testify that [the victim, Mike Stafford,] did testify at that trial against [the Defendant]. That will be the proof in that case – I mean, if Mr. Roberson was called to testify.

Howard Upchurch testified that he represented the Defendant for the charges brought against the Defendant for the homicide of Ralph Wilkey. He said that, at the end of April of 1999, he provided the Defendant with a list of witnesses that the State intended to call at the Wilkey trial and that Mike Stafford's name was on that list. Upchurch further testified that Stafford testified against the Defendant during the Defendant's trial for Wilkey's homicide. On cross-examination, Upchurch explained that as a criminal defense lawyer he routinely receives a list of State witnesses and that he shares such lists with his clients.

Joe Johnson testified that he has known both the Defendant and the victim, Stafford, all of his life. He said that, on the Thursday before the victim was shot, the Defendant told him that Stafford was on the Defendant's "list." Johnson explained that the Defendant often joked about different people, so he did not tell the victim or the police what the Defendant had said. On cross-examination, Johnson testified that Stafford is his first cousin. He acknowledged that he did not know exactly what the Defendant meant when he made the statement about the victim being on his "list."

Elizabeth Summers testified that she grew up with the Defendant, that she has known Stafford for years, and that she has known a man named Dennis Cagle throughout his entire life. She testified that, at 10:30 p.m. on May 2, 1999, she went to her job at Nyla's Place, a gas station and convenience store. During her shift, which lasted from 11:00 p.m. on May 2, 1999, until 7:00 a.m. on May 3, 1999, neither the Defendant nor Cagle came to her store. Stafford, however, entered the store alone at around 11:40 p.m. on May 2, 1999, and purchased a twelve-pack of beer and two packs of cigarettes. Willie Mae Pendergrass and Eddie Tollett were present when the victim entered the store. Summers testified that, about twenty minutes after Stafford came to Nyla's Place, she heard, via a police scanner, that Stafford had been shot. On cross-examination, Summers testified that Stafford's purchase of beer and cigarettes from Nyla's Place was not an unusual event, and, at the time of his purchase, he did not look afraid or upset.

Willie Mae Pendergrass testified that her sister owns Nyla's Place, and Pendergrass was at the store from 7:00 or 7:30 p.m. on May 2, 1999, until 3:00 or 4:00 a.m. on May 3, 1999. She said that, during this time, she did not see the Defendant, whom she has known for fifteen years, but she did see Stafford at the store on May 2 at around 11:30 or 11:45 p.m. Pendergrass testified that, while she was still at Nyla's Place at around 12:00 a.m., she heard that Stafford had been shot. On cross-examination, Pendergrass testified that she had not seen Stafford in the store during late night hours before and that Stafford rushed in and out of the store.

Dennis R. Cagle testified that he has known the Defendant for most of his life and that the Defendant is his friend. He said that, in May of 1999, he lived with Victoria Dodson on Brockdale Mountain, and, on May 2, 1999, at around 9:30 or 10:00 p.m., the Defendant drove to his house and asked him to drive the Defendant to get something to eat. Cagle noted that the Defendant had been drinking alcohol, and Cagle agreed to drive the Defendant into town. He testified that they went to the McDonald's in town, which is a thirty to thirty-five minute drive, they drove around for a while, and then they went to Nyla's Place to get some beer. He could not recall exactly when they arrived at Nyla's Place and agreed that they may have arrived there after 11:00 p.m. He said that the Defendant got out of the vehicle, but he did not actually see the Defendant go into the store. When the Defendant returned to the vehicle, he said that the store would not sell him beer. Cagle testified that the Defendant told him that Stafford could purchase beer from the store.

The Defendant gave Cagle Stafford's address, and they drove to Stafford's house where the Defendant exited the vehicle and knocked on Stafford's front door. Cagle testified that a female, whom he did not recognize, came to the front door and spoke with the Defendant, and then a few minutes later Stafford came to the door. He said that Stafford and the Defendant appeared to be talking, and then they got into Cagle's truck, they all drove to Nyla's Place, and Stafford entered the store. He testified that he did not see the Defendant give Stafford any money for the beer, but Stafford came back from the store with some beer and got into the truck. He testified that they all drank and drove around.

Cagle testified that the three men went to the Veteran's Club ("VFW") because the Defendant had to use the restroom. They parked in a dimly lit area, and all three men exited the truck. Cagle said that he stood on the driver's side of the truck while the Defendant and Stafford stood on the passenger's side of the vehicle, talked for awhile, and then started walking towards the back of the VFW. He testified that he did not know whose idea it had been to go back to the VFW, and then he acknowledged that he had previously told David Emiren, a former Tennessee Bureau of Investigation ("TBI") agent, that the Defendant asked Stafford to go to the back of the VFW. Cagle said that he started to follow them, the Defendant told him to go back to the truck, and Cagle went back and sat down in the truck. He said that Stafford and the Defendant were gone behind the VFW for "a few minutes," and then he heard two shots. He then saw Stafford run from behind the VFW towards Stafford's house, and he heard Stafford make "some kind of unintelligible statement," which he described as "more or less a moan or a groan." He explained that, as he watched Stafford run, the Defendant got back in the pickup truck.

Cagle testified that he never saw a weapon and that he did not see anyone else at the VFW. Cagle asked the Defendant what had happened, and the Defendant replied that he "shook him up a little." Cagle testified that, when asked, the Defendant denied shooting Stafford. The Defendant said, "Let's go home," and they went back to Cagle's house, which took about thirty-five minutes, and the two did not speak as they drove. Cagle said that, when they returned to his house, Dodson was there, and Cagle took a shower while the Defendant sat on his couch and ate a hamburger. Cagle testified that he did not know if the Defendant went to the Defendant's vehicle before he entered Cagle's home.

Cagle said that, while he was in the shower, Dodson came to the bathroom door and told him that Ed Wooden was at their home and wanted to speak with him. Cagle went to the kitchen door and asked Wooden to come inside, and Wooden replied that he would wait on Cagle. Cagle thought that Wooden could not see the Defendant inside Cagle's house from where Wooden was standing, so he assumed that Wooden did not know that the Defendant was inside. Cagle left with Wooden and went to the jail to speak with the police.

Cagle testified that, the day after Stafford was shot, he provided Agent Emiren with a statement and denied saying anything untruthful. He explained that, on the night of the crime, both he and the Defendant drank a lot of alcohol and that he did not want to tell the agent anything more than necessary. Cagle testified that he owned a forty-five caliber pistol and that, on May 2nd or 3rd of 1999, the pistol was in Barney Nerrgaurd's pickup truck. He testified that, later, Agent Emiren returned and asked Cagle about this forty-five pistol, both he and Agent Emiren shot his gun, and the agent retrieved some hulls from the pistol. Cagle said that Agent Emiren returned to Cagle's house again and asked Cagle for his gun, and he told Agent Emiren that he had traded his gun for a rifle at a gun store. Cagle identified a weapon presented by the State and testified that it was the gun that he had owned when the crime had occurred. Cagle denied loaning the weapon to the Defendant at any time prior to the victim's shooting and denied ever seeing the Defendant in possession of this pistol.

On cross-examination, Cagle acknowledged that he had a dispute with Stafford in the past but testified that this dispute was not a "big deal." He testified that, on the night of the crime, he had consumed "a couple of six-packs" of beer prior to the Defendant's arrival at his house. When the Defendant arrived, he seemed like he was in a good mood and did not appear to be hiding a weapon. Cagle further testified that they did not discuss Stafford or the Defendant's upcoming trial for Ralph Wilkey's homicide. Cagle said that no one threatened Stafford before he got into Cagle's truck. He acknowledged that he was intoxicated the first time that he provided Agent Emiren with a statement. Cagle denied possessing a weapon on the night of the crime but acknowledged that he had a pruning saw in his truck. Cagle testified that the Defendant never expressed any intent to kill Stafford, and he never said that he tried to kill Stafford.

On redirect examination, Cagle said that, at the time of the crime, he also owned a twelve gauge shotgun and a thirty-eight revolver, and the thirty-eight was kept inside Dodson's purse. He said that he never saw the Defendant with the thirty-eight revolver and that he did not think that the Defendant knew that Dodson had that gun. On recross-examination, Cagle testified that it was pretty dark at the VFW and that he turned the headlights off when the men were standing outside the truck.

Victoria Gossett Dodson testified that she has lived with and dated Cagle for six years. She said that on Sunday, May 2, 1999, the Defendant, a friend whom she has known all her life, came to their home at around 9:30 or 9:45 p.m. She said that the Defendant had been drinking alcohol, but he was not drunk, and he asked Cagle to take him to town to go to McDonald's and to get some more beer. She estimated that Cagle and the Defendant left the house no later than 10:00 p.m. and that she saw the men again about two or two and a half hours later. She said that the Defendant

seemed more intoxicated when the men returned and, while Cagle had consumed a few beers before the men left her home, he did not appear drunk. She said that, after the men returned to her house, Cagle took a shower, the Defendant sat on her couch and ate a hamburger, and no one engaged in any conversation about Stafford.

Dodson said that she heard someone pull into her driveway, so she looked outside and saw Wooden and some men at her back porch. Wooden asked her if Cagle was home, and she told him that Cagle was just getting out of the shower and invited Wooden and the men who accompanied him to come inside, but the men said that they would wait outside for him. Cagle then went outside to speak with the men. Dodson testified that Wooden and the men who accompanied him could not see the Defendant from where they stood, that she did not tell these men that the Defendant was in her home, but the men pulled in right behind the Defendant's car. She said that the Defendant remained in her home while Cagle left with Wooden to answer some questions.

Dodson said that she asked the Defendant, "What's going on?" and that he replied, "We shot [Stafford]." She asked the Defendant who shot Stafford, and he said that he shot Stafford once and that Cagle shot him twice. She said that the Defendant told her to call the hospital to see if Stafford was dead, which she did and learned that Stafford had been transferred to another hospital. The Defendant asked her to call that hospital to see if Stafford was dead, which she did and learned that Stafford was going to have surgery to repair the damage from his gunshot wounds. She told the Defendant what she had learned, and the Defendant told her, "He needs to die and go on. He needs to die and go on." Dodson testified that she asked the Defendant why this had happened, and the Defendant did not respond and appeared to pass out on the couch.

Dodson testified that the police later called her on the telephone and said that they were coming back to her house to get the Defendant, which they did and arrested the Defendant. She thought that she showed Agent Emiren her thirty-eight pistol. Dodson testified that Cagle owns a forty-five pistol, but he did not have it with him on the night of the crime. She said that she spoke with Agent Emiren the day after the crime had occurred, but she was not completely truthful with him because she was scared that she might get Cagle into trouble. She said that she did not tell the agent that the Defendant had said that Stafford needed to die on the night of the crime because she was trying to protect Cagle and the Defendant. She said that, later, she told Agent Emiren what the Defendant had said.

On cross-examination, Dodson testified that she loved Cagle and that she would hate to see him go to the penitentiary. She said that she and Cagle rode on four-wheelers on the day of the crime and finished riding about ten minutes before the Defendant came over to their house. She acknowledged that two full years passed before she told Agent Emiren that, on the night of the crime, the Defendant had said that Stafford needed to die. She testified that she drank alcohol on the night of the crime, that she takes Xanax, and that she should not mix alcohol with her prescriptions. She said that the Defendant never threatened her or her family. She said that, after these events had occurred, she searched her entire home for a pistol but could not find one.

Virginia Wright Stafford testified that, at the time of trial, she was married to Stafford, the victim, and that she has lived with him for the past twelve years. She described her home's location in relation to Nyla's Place and the VFW. She explained that one can get to the VFW from her house by crossing through her neighbor's yard and then going through a hayfield. She testified that she has known the Defendant as an acquaintance since she first started dating Stafford. She said that the Defendant came to her home between 10:00 and 10:30 p.m. after she had gone to bed, Stafford answered the door, and she heard the Defendant ask Stafford to leave the house. She went to the door and saw the Defendant standing there, and Stafford left with the Defendant. She did not recall at what hour Stafford returned to their residence, but, when he returned, he told her to call 9-1-1 because the Defendant had shot him. She said that Stafford was bent over, holding his side, and told her that he was dying. She called 9-1-1 and Gary Johnson, a police officer with the Pikeville Police Department, arrived at her home and took Stafford to the Bledsoe County Hospital. She said that he stayed at this hospital for approximately two hours and that he was then transported to the UT Hospital in Knoxville where he stayed for approximately twenty days. On cross-examination, she denied knowing about any disagreements between Stafford and Cagle. She acknowledged that Stafford drank and that he was apparently able to buy beer on Sundays. She testified that, when she saw the Defendant at the door, no one acted suspiciously, and she did not see any weapons.

Steven Michael ("Mike") Stafford, the victim, testified that he lives with and is married to Virginia Wright Stafford. He said that he has known the Defendant his entire life and that Ralph Wilkey was his brother-in-law. Stafford testified that, after Wilkey's death in 1998, he provided the police with some information regarding the Defendant and that he served as a witness for the State in a homicide case brought against the Defendant. Stafford said that, on Sunday, May 2, 1999, the Defendant came to his porch door and asked him to take the Defendant to get some beer. He agreed, the Defendant gave him twenty dollars, and he went to Nyla's Place with Cagle and the Defendant to buy the beer. Stafford saw Nyla's sister, Willie Mae Pendergrass, in the store, and he purchased the beer and went back to the truck. He said that the Defendant asked him to ride around and drink a beer and that he declined the invitation because he had to awake at 3:00 a.m. to take his wife to work. He said that the Defendant said, "Well, can't you ride with us and just drink one beer?" He agreed to this proposition, and they went to the VFW.

Stafford testified that he did not know why they went to the VFW and that the VFW was closed, so they stood outside talking. Stafford explained that the Defendant went behind the building to go to the bathroom and then hollered at him, asking him to come around the building. Stafford testified that he and Cagle started to go around the building, and the Defendant said, "Not you, Denny, just Mike." Stafford testified that Cagle stayed by the truck in front of the building, and Stafford walked around the building. He said that he stood about three feet from the Defendant, and the Defendant asked him, "[Y]ou think they'll do anything to me about Ralph?," and he replied, "I think they . . . ," and then the Defendant shot him three times. Stafford testified that he could not see the gun in the Defendant's hand because of how the Defendant was standing, but he could tell that the Defendant was aiming at him when the Defendant shot the gun. He testified that the first gunshot hit him just below his right nipple and exited below his left shoulder blade. Stafford described how he ran around the building, went across the parking lot, went into some bushes, and

then he had to sit down. He said that he was in pain and felt like he had been shot more than once. He did not recall seeing Cagle when he ran, and he was scared that the Defendant and Cagle were working together.

Stafford said that he ran to his home and arrived at the first step of his residence, and then he picked up an item and threw it against the wall to get his wife's attention. Stafford thought that he told his wife that the Defendant had shot him and told her to call 9-1-1. He said that Officer Johnson arrived, that his wife put him in the officer's car, and the officer took him to a hospital. From there, he went to another hospital in Knoxville, had surgery, and he stayed there for about two weeks. Stafford acknowledged that he had previously received a ticket for presenting a false identification, and that, in 1995, he pled no contest to improper influence of a jury.

On cross-examination, Stafford acknowledged that Cagle had accused him of raiding Cagle's marijuana patch. He said that, on the night of the crime, he was not surprised when Cagle arrived at his house because Cagle was with the Defendant. He said that the Defendant never threatened him over the course of the evening, and the Defendant did not seem to be hiding a weapon. Stafford testified that he did not see what kind of gun the Defendant used to shoot him. He said that, before the Defendant called him to walk around the building, the Defendant had not asked him about the Wilkey case. When asked if he told Officer Johnson that the Defendant and Cagle shot him, he testified that he could not recall because he was weak and "out of it."

Officer Gary Johnson testified that he was employed with the Pikeville Police Department on Sunday, May 2, 1999, and that the sheriff's department received a call about a shooting during the early morning hours of May 3, 1999. He said that he went to the victim's residence, and, when he arrived, he saw Stafford bent over on his steps. Stafford told Officer Johnson that he was going to die and that the Defendant had shot him, and the officer took Stafford to the hospital and could see blood coming from Stafford's back. On cross-examination, Officer Johnson testified that he never interviewed Cagle about the incident. He acknowledged that Stafford said that both the Defendant and Cagle shot him. He testified that he did not know if anyone ever performed a gunshot residue test on the Defendant or Cagle.

David Emiren, a former agent with the TBI, testified that he investigated the victim's shooting and that he went to the VFW on May 3rd, at around 5:30 a.m., where he took photographs of the area and found a forty-five caliber hull that had been expended from a weapon and landed behind the VFW. He testified that he was unable to find a weapon or the bullet that went through the victim. The agent testified that he went to Cagle's residence to find out about Cagle's guns and that Cagle said that he owned a forty-five pistol but that gun was located elsewhere. Agent Emiren explained that, later, he found the weapon in a store that Cagle had traded firearms with and that he took some test shots with this weapon. He testified that this weapon expended forty-five hulls and that he retrieved the hulls from this gun, and they were compared against the hull that was found at the crime scene. The agent testified that he was the officer that investigated Ralph Wilkey's death, that Stafford was a witness for the State, and that Stafford testified against the Defendant. He acknowledged that the Defendant's car was at Cagle's residence, that he searched the Defendant's car, and that he did not find a weapon inside.

On cross-examination, Agent Emiren acknowledged that Stafford was not the only individual on the State's witness list in the Wilkey case and that he and about a dozen other people were on the list. He testified that he did not perform a gunshot residue test on Cagle. The agent acknowledged that he knew that Cagle was at the crime scene when he conducted his investigation, and he explained that, according to his understanding, Cagle was not the alleged shooter. He acknowledged that almost two years had passed before he tested Cagle's forty-five to see if it produced a hull that matched the one discovered at the crime scene. He explained that, when he conducted his investigation, Cagle said that the weapon that ejected the forty-five hull was in Barney Neergaurd's truck. Agent Emiren testified that he searched the Defendant's vehicle and that he could not find a weapon inside. He did not recall if he found a witness list inside the Defendant's vehicle. On redirect examination, Agent Emiren testified that Stafford was an important witness for the State in the trial for the charges brought against the Defendant for Wilkey's murder.

Dinnah Caluag, a TBI firearms examiner, testified that she examined a forty-five pistol that Agent Emiren had submitted to the lab. She explained that this weapon uses forty-five caliber cartridges, and she explained how the gun operates and that it ejects cartridge cases that are also referred to as hulls. She identified a cartridge case that was submitted to the lab and collected from the crime scene, and two other cartridge cases that Agent Emiren gave to her. She explained that a gun makes certain markings on a hull when it is fired and that she compared the hull taken from the crime scene with the other two hulls that Agent Emiren had given to her. She testified that the hull from the crime scene could have been fired from the forty-five pistol Agent Emiren submitted, but the other hulls did not have sufficient markings to determine from what weapon they had been fired.

Richie Dykes and Teresa Smith testified that, on the day the victim was shot, Cagle had fired a pistol, possibly a forty-five, two or three times over the top of Jeremy Davis's truck. Smith testified that the Defendant is her uncle and that she went to Dykes's residence to look for hulls because she thought that the Defendant had been set up. Smith acknowledged that she testified as a witness for the Defendant in the Wilkey trial.

The Defendant testified that he is friendly with both Cagle and the victim, but he had heard that Cagle and Stafford had problems with each other in the past. He testified that, on the day of the crime, he went to his brother Buck's house, drank some beer, and then went to Cagle's house. He testified that he had loaned Cagle one hundred dollars, and he went to Cagle's house to collect the money. He said that, when he arrived at Cagle's house, Cagle asked him to go with Cagle to Dunlap to get some hamburgers and beer, and the Defendant agreed. The Defendant testified that Cagle drove to the McDonald's, but it was closed, so they went to the Golden Gallon to get some beer. The Defendant testified that Cagle's girlfriend, Dodson, was in the kitchen when they returned to Cagle's house, and Cagle went into another room and said, "I'll be back" and was gone for about an hour and a half. The Defendant thought that Cagle was going to his father's house because Cagle's father was sick and lived next door. The Defendant said that he sat down on Cagle's living room chair, and when Cagle finally returned, Cagle had showered but, he did not appear to need a shower.

The Defendant denied seeing Stafford on the night of the crime and said that he did not leave Cagle's house until the police took him into custody. The Defendant testified that he had seen the

gun that was entered into evidence several times before at Cagle's residence. He testified that he did not own a gun like the one that had been entered into evidence, that he does not own a forty-five, and that he did not own a forty-five on the day of the crime. He denied going to his car when they returned to Cagle's house. He said that, when the deputies arrived at Cagle's residence, they said who they were, and they asked to speak with Cagle. He acknowledged that, once the deputies left with Cagle, he could have left Cagle's residence. The Defendant testified that he did not leave and that the police officers later took him into custody. He testified that he is right-handed and that he can shoot a pistol with his right hand.

On cross-examination, the Defendant acknowledged that his thumb and his index finger are his only working right-hand fingers and that his pinkie finger and ring finger are his bad fingers. The Defendant explained that, if he had problems using his right hand, then he could not have worked at his job. The Defendant said that, on the day of the crime, he spoke with his brother and Dennis Johnson. He said that he saw these people during the day and that he went to Cagle's residence at around 9:00 or 9:30 p.m. He said that Cagle had owed him money for a couple of months, and he did not know why he chose to retrieve his money from Cagle on that particular day. The Defendant testified that he sat and watched television when Cagle left his home at around 11:30 p.m. after they returned from their trip to town.

The Defendant said that Cagle called the Sheriff when he returned, at around 12:30 a.m., and asked who had gotten shot in Bledsoe County. Cagle told him that Cagle heard about the shooting on a scanner, but he did not have a scanner. The Defendant acknowledged that he knows Wooden personally and that he did not go to talk to Wooden when the police officers arrived at Cagle's residence. The Defendant said that he figured that the police officers would come and speak with him if they wanted to talk to him. He testified that he had no reason to speak with the officers even though he had heard that somebody had been shot. The Defendant acknowledged that he stayed at Cagle's house after Cagle left with the police even though he did not know if Cagle would return. He denied telling Dodson that he shot Stafford and that Stafford needed to die. The Defendant said that Dodson did not use the phone while he was at Cagle's house.

The Defendant acknowledged that Upchurch represented him in the Ralph Wilkey case and that he received a list of State witnesses in the mail, and he went over the list with Upchurch. He acknowledged that he knew that Stafford was on this witness list, but he did not recall telling Joe Johnson that Stafford was on his "list." He further testified that he did not say that Stafford was on his list and that Johnson's statements are incorrect. The Defendant testified that Virginia Wright Stafford was mistaken when she said that she saw the Defendant knocking at her door. He also testified that the victim's testimony that the Defendant shot him is incorrect and that he did not tell Dodson that he shot the victim.

Based upon this evidence, the Defendant was convicted of attempted first degree murder, and the trial court sentenced him to twenty-four years in the Department of Correction.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it: (1) refused to strike prospective jurors; (2) did not instruct jurors on the charge of aggravated assault as a lesser-included offense; (3) refused the Defendant's request for a mental evaluation; (4) denied the motions to replace Defendant's counsel, which caused the Defendant to receive ineffective assistance of counsel; and (5) improperly allowed references to the Defendant's indictment for the murder of Ralph Wilkey. Finding no reversible error, we affirm the judgment of the trial court.

A. Jury Selection

The Defendant contends that the trial court erred when it refused to strike prospective juror Larry Hankins because he is related to the victim. Further, he alleges Hankins allegedly made improper comments to other jurors. Next, he contends that Ronald Nipper's inclusion was prejudicial because he is Danny Cagle's first cousin. Finally, he contends that juror Ralph Angel prejudicially withheld pertinent information during voir dire. The Defendant further argues that the inclusion of these jurors deprived him of his Constitutional right to a trial by an unbiased jury. The State counters that these issues are without merit and that the record lacks any evidence that any of the jurors were biased against the Defendant.

1. Juror Larry Hankins

The Defendant contends that the trial court erred when it refused to strike prospective juror, Larry Hankins, who is related to the victim. The State contends that the Defendant waived this issue because he did not object to the inclusion of Larry Hankins on the basis of his relation to the victim.

During the jury selection process, the trial court asked potential jurors if they knew the victim, Mike Stafford. The following dialogue ensued with the potential juror, Larry Hankins:

> Juror: His wife is my first cousin.
> The Court: His wife is your first cousin. Now that's a fairly close relation, anything about that that would give you any difficulty in this case today?
> General Pope: Your Honor, she will be a witness.
> The Court: What?
> General Pope: The wife will be a witness.
> The Court: Okay. The wife will actually be a witness and that will be your cousin. Anything about that, as a juror you've got to be, you've got to scrutinize the testimony of all witnesses. Witnesses are presumed to tell the truth, but once they say what they say the juror has to be able to make a judgment as to whether or not they think they have and that doesn't necessarily mean they would be lying, but maybe they didn't remember something correctly, or they weren't able to articulate, that is, relate it very clearly, and for several reasons you might not accept what a witness had to say. Can you judge her testimony the same as you would anybody else or is she going to get a benefit when she takes the stand?

> Juror: Same as everybody else.
> Harmon [Defense Counsel]: What's the name?
> The Court: He said the same as everybody else. What's your name, sir?
> Juror: Larry Hankins.
> The Court: Okay. Mr Hankins, I'm not going to excuse you at this time unless you think in some way because of that you'd be leaning one way or another in the case. Do you have any reason to lean one way or another in this case? You do not, okay. Okay, Mr. Hankins, I would not excuse you.

The Defendant's trial counsel further questioned Hankins about his ability to serve as an impartial juror, and the following dialogue ensued:

> [Defense Counsel]: All right. And I believe, Mr. Hankins, you said that you're actually related to [Virginia Stafford].
> Hankins: Yes.
> [Defense Counsel]: To what degree?
> Hankins: First cousins.
> [Defense counsel]: First cousins. That's pretty darn close.
> Hankins: Pretty close.
> [Defense Counsel]: Well, you, obviously know your first cousin and y'all may have family reunions, you may just see each other down here at the Jiffy Mart or whatever, and you know, if you end up on this jury you're going to have to make a real tough decision. It's because, you know, there are charges in this case that somebody shot her husband for whatever reason. Do you feel like that that family relationship that you're going to be able to set that first cousinship aside and listen purely to what comes off the stand and make a decision? Can you remove your relation and make a decision?
> Hankins: I hope so.
> [Defense Counsel]: Well, I know you're hoping so, but what we've got to have and I'm not trying to put you on the spot, but you're the only one that got through the net from back there that was related to someone and what we've got to have is really an assurance from you that your relationship, cousin, first cousin, will not cause you in anyway to lean against [the Defendant] and maybe put a little more weight in the State's case, because, you know, your first cousin will get right up here and testify, be looking at the jury and looking at the lawyers and, you know, she may be the most honest person in the world and she may not be, I really don't know her, but what it comes down to is you have to decide, you know, is the fact that she's my cousin going to make me lean towards the State's case a little more. Can you assure me that you will not?
> Hankins: Yes.
> [Defense Counsel]: Okay. I'm going to hold you to it.

The Defendant's trial counsel did not object to Hankins's inclusion on the jury.

The procedure relating to the selection of a fair and impartial jury is a matter entrusted to the sound discretion of the trial court. State v. Plummer, 658 S.W.2d 141, 143 (Tenn. Crim. App. 1983); See Tenn. R. Crim. P. 24(a). Tennessee follows the common-law rule by which challenges of juror qualifications fall within two distinct classes. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993). Those challenges based on defects in qualifications such as alienage or statutory requirements are called propter defectum, which, literally translated means "on account of defect." Id. (citing BLACK'S LAW DICTIONARY 1098 (5th ed. 1979)). The other class of challenges, propter affectum is based on bias or prejudice "actually shown to exist or presumed to exist from circumstances." Id. (citing Durham v. State, 188 S.W.2d 555, 559 (Tenn. 1945)(quoting 1 Bouvier's Law Dictionary 451 (Rawle's 3d rev. 8th ed. (1914)). Propter defectum challenges must be made prior to verdict, but propter affectum challenges may be made after verdict. State v. Furlough, 797 S.W.2d 631, 652 (Tenn. Crim. App. 1990).

According to Tennessee Code Annotated section 22-1-105 (2003): "No person can act as a juror in any case in which the person is interested, or when either of the parties is connected with the person by affinity or consanguinity, within the sixth degree, computing by the civil law, except by consent of all the parties." An objection based on a disqualification under Tennessee Code Annotated section 22-1-105 is waived unless raised prior to the swearing of the jury. See State v. Elrod, 721 S.W.2d 820, 822 (Tenn. Crim. App. 1986); see also State v. Brock, 940 S.W.2d 577, 579 (Tenn. Crim. App. 1996) (holding that a defendant waived any objection to the inclusion of a juror who was related to one of the victims by failing to object when the juror disclosed the relationship).

The trial court did not abuse its discretion when it did not strike Hankins as a juror. The record reflects that the Defendant's trial counsel had ample opportunity to fully question Hankins about his ability to serve as an impartial juror despite his relation to the victim, and his trial counsel did not object to the inclusion of Hankins on the jury based upon a violation of Tennessee Code Annotated section 22-1-105. Therefore, the Defendant waived any objection to the inclusion of Hankins on the jury on the basis of his relation to the victim.[1] Later during the voir dire process, the Defendant used a peremptory strike to remove Hankins from the jury pool because Hankins allegedly made improper comments to another juror. The Defendant is not entitled to relief on this issue.

The Defendant also contends that the trial court erred when it did not strike Larry Hankins from the jury after he was accused of making improper, prejudicial comments to other jurors during voir dire and when it did not disqualify the jurors who were allegedly tainted by Hankins's statements. The Defendant also argues that he was further prejudiced because a juror tainted by Hankins's alleged improper comments was included on the jury after the Defendant had exhausted his peremptory strikes, and the Defendant was thus precluded from using a peremptory strike against this juror. The State contends that this issue is without merit, and the trial court did not abuse its

[1]The Defendant later objected to the inclusion of Hankins on the jury because Hankins allegedly made improper statements during a break in the voir dire process, and we discuss this objection below.

discretion when it impaneled the jury.

After a break during the jury selection process, someone told the Defendant's attorney that she overheard Hankins making a statement to other potential jurors about the case. The following dialogue ensued:

> [Defense Counsel]: Mrs. Driver just brought to my attention, a lady came up to her who is, I believe, a relative of [the Defendant's] who says during the break she heard Mr. Hankins, I think it's Larry Hankins who's a cousin to Virginia Stafford, make a comment to, perhaps another - -
> Mrs. Driver: Several jurors.
> [Defense Counsel]: Several jurors, something about we ought to go just hang him now, something to that extent. I'd like to get that woman in here and see what she heard and who said it and who they said it to.
> The Court: Do you want to ask that question of him first?
> [Defense Counsel]: I'd rather get her in here. Find out exactly what she said she heard. Do you know her name? You go ahead and get her. . . .
> The Court: Ma'am, it's stated that you thought you'd overheard something.
> General Pope: Do you want to swear her in your honor?
> Audience Member: Yeah, I'll swear.
> (Whereupon, the female audience member was sworn.)
> The Court: What do you - -
> Audience Member: I was setting down there smoking by the ashtray on the bench and there was four of the jury members down there talking and the Hankins man, I know him just from where I see him, he said, "We might as well just tell Jimmy Pope he's guilty and hang him now and get it over with and have a party for the 4th." I thought, well, that's not fair.
> The Court: Yeah, I understand. People say stuff like that.
> Audience Member: He said, "We'll just go to the park and we'll fish tonight and spend the night."
> The Court: Did he say anything about, I mean, like if he's be doing it for a reason or that he wanted to get it over with?
> Audience Member: Get it over with and get it out and just go ahead and charge him guilty and be done with it.
> The Court: Okay, we can ask - -
> [Defense Counsel]: What's your name, ma'am?
> Audience Member: Melissa Olinger-Nipper.
> [Defense Counsel]: Melissa Olinger-Nipper.
> Olinger-Nipper: It's hyphenated. Jimmy knows me. I went to school with him, Mr. Pope.
> The Court: Okay.
> Olinger-Nipper: I have no reason to lie.
> The Court: Who was it?
> Olinger-Nipper: It was Mr. Hankins, but there was somebody setting beside me that

heard the same thing.
The Court: Okay. Well, we can deal with something like that.
Olinger-Nipper: Yeah, I just didn't know if I should tell it or not, Your Honor.
The Court: Yeah, you should tell it.
Olinger-Nipper: Right, that's what I'm saying, he may not have meant it.
The Court: We'll bring him in and we'll see, let him be asked a couple of questions on it, if he's that irresponsible to say something like that and see if it bothers anybody.
[Defense Counsel]: Thank you, ma'am
The Court: Is Mr. Hankins on the original 12?
[Defense Counsel]: Right, Larry Hankins.
General Pope: Your Honor, he's the one that's a cousin to Mrs. Virginia Wright, the victim's wife.
The Court: Ask Mr. Hankins to step back here. He's on the front row of the jury box, the [farthest] away from us.
Mr. Hankins, you were overheard by someone making a comment, and it may be understandable as a joke or something, but did you make a comment let's go ahead and find him guilty so we can go out and party, did you say anything like that?
Hankins: No, sir, I did not.
The Court: Okay. We have a person that thought they overheard that. Were you there when somebody else might have said something like that? It's suppose to have been just during break standing around talking with some other jurors, just some comment to the effect that we ought to hang him and get this over with so we can party tonight or something like that.
Hankins: No.
The Court: Anything like that?
Mr. Hankins: No, when I left I went to my truck to make sure no one stole anything out of it and by the time I walked back up on the steps it was about time to come back in.
The Court: So you weren't involved with any conversations with anybody?
Hankins: No.
The Court: Must have been somebody else if that's the case. You wouldn't share any such sympathy as that, I mean, as far as just wanting to get something over with?
Hankins: Oh, no, sir.
The Court: We understand how important it is for everybody. Okay, you're done, unless someone wants to ask him.
[Defense Counsel]: Did you overhear anyone out there make some sort of comment, you know, like to get this over with so we can go ahead and celebrate the 4th, or go fishing at the park, something like that?
Hankins: Now, I did make a comment to the Deboard boys, I said, "If we go to the park at least you can go fishing." Now, I did make that comment.
[Defense Counsel]: About meaning if you got put up in the motel there?
Hankins: Yeah.
[Defense Counsel]: Which Deboard boys are we talking about here? Jerry Deboard?

The Court: Nothing wrong with that. That would be a good idea. I hope you can go fishing if you're up there.
Hankins: Well, Jerry and Roy Deboard, Jr., was both standing there, you know. They's talking about they's getting ready to go fishing this morning. I said, you know, if you do get picked up at least you can go fishing, you know, which I didn't think anything was out of the ordinary. Just a couple of old country boys talking about fishing.
[Defense Counsel]: That's all I have.
The Court: All right. Just take your seat back and we'll be out in just a minute. We may want to call somebody else, I don't know. Do you want to call these other folks on something like that?
Mrs. Driver: She was sitting outside she said smoking when she heard it.
[Defendant]: Bring in Jerry Deboard just to make sure.
The Court: It's obvious that was the conversation that she was overhearing.
[Defense Counsel]: Probably so. If we could bring just one of the two in he mentioned. Jerry Deboard. He's on the back row, second one from you just to confirm what he says.
The Court: You're Mr. Deboard?
Deboard: Yes.
The Court: Mr. Deboard, there has been some discussion and that's why we want to ask before we get any further in here, that there was some comment made maybe that, at least one person that was standing outside while everybody was out taking their breaks and so forth, that there was an indication that was that statement, he didn't, in his position, he didn't restate it exactly as it was told to us, but it does appear that some kind of discussion occurred about fishing or maybe even getting the trial over so they could go fishing. Were you - -
Deboard: I didn't hear nothing about fishing, he was just aggravating said, I didn't hear nothing about fishing. He was aggravating saying, you know, a man get thrown out by this and that, you know, you know how people will set around and say something like that, but no, there wasn't no comment that I recall of fishing, Of course, now, I was talking to my wife, because I hadn't been able to get a hold of her and told her that so far I'd been picked to stay on the jury. There's four or five of us standing there. They may have been discussing something on fishing.
The Court: Did anybody make any - -
Deboard: Now, my cousin was talking about fishing. He said if he had his depth finder hooked up last night you'uns wouldn't have got a hold of him, because he'd done already been gone this morning. Now they was a comment - -
The Court: Is he on the jury, too?
Deboard: He's picked, but he's still setting out - -
The Court: He's a replacement juror.
Deboard: He's still a replacement. His comment was fishing. Now, him and Larry may have been saying something about that during the time that I was talking to my wife.
The Court: Did you overhear anybody make any kind of statement that could be

considered serious - -
Deboard: Not nothing to me.
The Court: - - That they would decide the case –
Mr. Deboard: Not nothing serious.
The Court: Just to get the heck out of Dodge.
Deboard: To me not nothing seriously, it was just, you know, people standing around talking. To me nothing seriously, no, I didn't think they was, nobody was being serious you know.
The Court: Did you hear anybody say, well, let's just go ahead and find him guilty so we can, you know, go party tonight or tomorrow night?
Deboard: Larry, he said something about, somebody else said, I think he's guilty, you know, like I said, just joking, but . . . in my opinion I don't think anybody was being serious. It was just, you know, people joking.
The Court: Well, you understand that, obviously, this is vitally important to everybody here -
Deboard: Yes, sir.
The Court: And certainly to [the Defendant], and no decision ought to be made because of an impending party - -
Deboard: Yes, sir.
The Court: And you wouldn't do that would you?
Deboard: No, sir. Me myself, I didn't make no kind of comment like that. I was just, I was standing there on the back step back there talking to my wife, telling her to be around home close by because I may have to call her to have her bring some clothes.
The Court: Anybody else want to ask anything of this juror?
[Defense Counsel]: No.
The Court: You can go on.
(Juror Excused.)
The Court: What it sounds like to me is just good old boys talking - -
[Defense Counsel]: It's good old boys mouthing off, but according to this witness, Mr. Hankins, maybe jokingly, stood up and said, We should go ahead and find him guilty so we can go fish or whatever?
The Court: I think what I should do is give them instruction just to impress upon them that, obviously, this case can't be decided based on anybody's idea, you know, including the case to meet some other schedule such as a party or something, and just kind of leave it at that.
[Defense Counsel]: I would like to go ahead for the record to make a motion to strike Mr. Hankins, though. I just feel like what he said shows prejudice on his part.
The Court: There may be some lack of maturity. I don't think it shows that he's going to do anything wrong to [the Defendant], so I'm not going to strike him. . . .
(Whereupon, court resumed . . . with all jurors present.)
Ladies and gentleman, I want to give you a little caution, all of you, and I don't think we're going to break up again until we actually have a jury selected, but I want to caution you one more time. You should not discuss this case in any way with each

> other during the breaks. You know, if something is said about the case it causes a person possibly to take some opinion or think you have an opinion about the case and it just might change people that are thinking, certainly, I know everybody wants to get along and it may be that someone would even say something that's kind of joking about the case, but it might be overheard by somebody who is extremely interested in the matter and it wouldn't be a joke if you were the one that was on trial or someone in their family and they heard a juror joking in some fashion about let's get it over with in a hurry or something to that effect. We had a little question about that and so I just want to tell you just generally be mindful that this is serious business and the less levity that you have about the matter the better. It doesn't mean you can't talk with each other about the time of day and so forth, but remember, especially if you were out around the courthouse, you just should not say anything about the case at all and I believe that should cover the grounds . . . .

The record reflects that Hankins was struck from the jury during the first round of challenges. The record reflects that both parties exhausted their peremptory challenges and that Roy Deboard was then placed on the jury.

The ultimate goal of voir dire is to ensure that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire rests within the sound discretion of the trial court. State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993). Rule 24(b) of the Tennessee Rules of Criminal Procedure governs challenges to potential jurors for cause and, in pertinent part, states, "Any party may challenge a prospective juror for cause if . . . there exists any ground for challenge for cause provided by law; [or] the prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror." However, a trial court is granted wide discretion in ruling on the qualifications of the jurors, and a trial court's decision in this regard will not be overturned absent an abuse of discretion. State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). Unless there has been a clear abuse of discretion, the trial court's discretion is not subject to review. See Lindsey v. State, 225 S.W.2d 533, 538 (Tenn. 1949). A trial court's finding of impartiality may be overturned only for manifest error. Patton v. Yount, 467 U.S. 1025, 1031 (1984); State v. Howell, 868 S.W.2d at 247.

In the case under submission, the trial court did not abuse its discretion when it refused to excuse potential juror Hankins for cause and when it did not disqualify any jurors who allegedly heard Hankins' statements.[2] The Defendant argues that inconsistencies between Hankins's and Deboard's testimony reveal that improper comments were made during voir dire that were prejudicial to the Defendant. However, this Court is unable to conclude that the trial court abused its discretion when it found that the conversation at issue had no bearing on the ability of Hankins and the Deboards to serve as impartial jurors. First, we note that Olinger-Nipper acknowledged that

[2] The State argues that the Defendant waived this issue because the Defendant failed to object to the inclusion of Jerry Deboard and Roy Deboard on the jury. However, as previously discussed, a challenge that is based on actual prejudice may be made after the jury verdict. See Akins, 867 S.W.2d at 355.

Hankins may not have meant the statements that she allegedly heard him make, and Jerry Deboard testified that the conversation was not serious. The record reflects that the conversation between Hankins and the Deboards revolved around their planned recreational activities and not the merits of the case at issue. The trial court determined that the conversation perhaps suggested that Hankins is immature but does not suggest that Hankins would treat the Defendant unfairly. We note that, the trial court, rather than the appellate court, is clearly in the better position to observe the demeanor, attitude, and body language of a potential juror from which the court may conclude the potential juror's capability of impartiality. See State v. Lorenzo Malone, No. M2003-02770-CCA-R3-CD, 2005 WL 1521788, at *3 (Tenn. Crim. App., at Nashville, June 27, 2005), *no Tenn. R. App. P. 11 application filed*. The record does not reflect that the trial court abused its discretion or committed "manifest error" when it impaneled the jury, therefore the Defendant is not entitled to relief on this issue.

Furthermore, we note that the Defendant has failed to show how the alleged error prejudiced his case. "[I]rrespective of whether the trial judge should have excluded the . . . challenged [juror] for cause, any error in this regard is harmless unless the jury who heard the case was not fair and impartial." Howell, 868 S.W.2d at 248 (citing State v. Thompson, 768 S.W.2d 239, 246 (Tenn. 1989)). The "failure to correctly exclude a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him." Howell, 868 S.W.2d at 248. The Defendant in the instant case has stated that a tainted juror, Roy Deboard, was included on the jury after he exhausted all of his peremptory challenges. However, defense counsel only questioned Jerry Deboard about his exposure to Hankins's prejudicial comments. The record contains no evidence as to what Roy Deboard heard or thought about the allegedly improper comments, and we decline to speculate. Because the Defendant failed to show that an incompetent jury or impartial juror was forced upon him, we conclude that the Defendant is not entitled to relief on this issue.

2. Juror Ronald Nipper

The Defendant argues that the inclusion of Ronald Nipper on the jury violated the Defendant's right to an unbiased jury because Nipper is the second cousin of the State's witness, Dennis Cagle. He contends that the inclusion of potentially biased jurors hindered his ability to meaningfully participate in the jury selection process and violated principles of justice and fair play.

First we note that the record shows that the Defendant failed to object for cause to Nipper's inclusion on the jury. During the voir dire process, the following dialogue ensued:

> General Pope: Anyone that knows Denny Cagle? Mr. Nipper, you know him?
> Mr. Nipper: I'm related to him.
> General Pope: You're related to him. What's your relationship?
> Mr. Nipper: Second cousin.
> General Pope: Second cousin, okay. Would it be fair to say, Mr. Nipper, that you already have an opinion about Mr. Cagle's credibility or lack of - - don't tell me which - - but an opinion about his credibility or lack of credibility?

Mr. Nipper: No.
General Pope: Okay. You could [sit] here and listen to his testimony and judge his testimony the same as anybody else?
Mr. Nipper: (Nods head up and down.)
General Pope: Okay. And if you thought he was telling the truth, you'd so find and if you thought he was not telling the truth you'd so find that, too?
Mr. Nipper: (Nods head up and down.)
General Pope: And the fact that you're related to him and say, say he testified to one thing and you end up finding differently than what he testified to, is that going to cause you any problem later when you have to see him on the street or reunion or whatever else, is that going to be in the back of your mind when you're there in the jury room?
Mr. Nipper: No.
General Pope: You can call it like you see it?
Mr. Nipper: Yeah.

After defense counsel became aware that Nipper and Cagle are second cousins, the following conversation ensued:

[Defense Counsel]:And these other people we talked about, Denny Cagle being cousins or friends of his, those people, can you assure me that that relationship, if he takes the stand you're going to treat him like any other witness? I know we're asking you to do some gymnastics here, but I'm going to hold you to the fact that you've said you can do that, all right?

The record reflects that the Nipper assured the trial court that his relations would not effect his ability to act as an impartial juror, and Defense counsel did not object to the inclusion of Nipper on the jury. Therefore, the Defendant is not entitled to relief on this issue.

3. Juror Ralph Angel

The Defendant contends that the trial court erred when it failed to exclude Ralph Angel as a juror because Angel willfully failed to inform the trial court that he knew about the Defendant's prior conviction for Ralph Wilkey's homicide. The Defendant also contends that, because the trial court asked prospective jurors on several different occasions if they knew anything about the Defendant, Angel's silence about his knowledge of the Defendant's prior homicide conviction reveals that he was not an impartial juror. The Defendant notes that all of the other potential jurors who indicated that they knew about the Defendant's prior homicide conviction were excused for cause after further questioning by the trial court. The State argues that the record lacks any evidence that juror Angel willfully concealed or failed to disclose information on voir dire that reflected his lack of impartiality. The State also argues that the Defendant was not prejudiced by the inclusion of Angel on the jury because a stipulation that the Defendant was indicted for the homicide of Ralph Wilkey was entered into evidence at the outset of the trial.

Juror Angel testified at the hearing on the Defendant's motion for new trial that he served

as the jury foreman in this trial, that he knew the Defendant before the trial began, and that he knew of the Defendant's prior homicide conviction. He explained that he did not disclose his knowledge during voir dire because he thought that the trial court did not specifically ask him questions regarding this information. The following dialogue ensued:

> General Pope: Do you remember the Judge asking some general questions at the beginning of all the jurors sitting out in the seats, did he do that?
> Angel: Yes, he asked some questions.
> General Pope: And the questions that he asked, if any applied to you, did you answer to those truthfully?
> Angel: I didn't feel like any applied to me.
> General Pope: None applied to you, okay. Then when you were picked up and put in the box were you asked more questions I assume?
> Angel: Some.
> General Pope: Maybe not individually, but - -
> Angel: Right.
> General Pope: And did you answer all questions truthfully in that scenario?
> Angel: Yes.
> General Pope: And that's never changed since the trial or anything, right?
> Angel: No.
> General Pope: Your Honor, without specific questions and know which ones- -
> The Court: (Interposing) In one of the questions that would have been asked, do you know of any reason why you can't be fair and impartial, that is usually ask[ed] two (2) or three (3) times?
> Angel: Correct.
> The Court: Did you know of any reason why you couldn't be fair and impartial?
> Angel: No.
> General Pope: Based on anything, I mean, this is another question that's some times asked, if you did know anything about [the Defendant], could you set that aside and decide the case solely on the facts presented to you in court.
> Angel: Yes.
> General Pope: And is that what you did?
> Angel: Yes.

The trial court: Well, at this point there's no reason to believe that it was anything more than negligent. I mean, he said he didn't think the question was asked that required his response that may be a mistake on his part, but that's not the same, you know, as intentionally doing it and then he says that it [had] no effect that he judged this case based on the facts he heard, so it seems to me like the burden would be on you to go further than just the fact that he got on the jury, maybe knowing more than he should have as far as what was trying to be elicited from him. You really need to be able to show something that would have caused him, first of all, to be getting on that thing for the purpose of convicting or give the Court at least some reason to infer that from some fact. I don't have any fact in which

> to infer other than the threshold issue of he may not have responded correctly, so I guess – I can go ahead and rule on this one, I don't see any reason, I don't believe there's any basis upon which to grant a new trial based on what Angel has testified to and what has been established, unless you have other witnesses that somewhere are going to impeach Angel.

The essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel. Akins, 867 S.W.2d at 355 (citing 47 Am. Jur. 2d, Jury § 195 (1969)). Pursuant to Tennessee Code Annotated section 22-3-101 (2003), "Parties in civil and criminal cases or their attorneys shall have an absolute right to examine prospective jurors in such cases, notwithstanding any rule of procedure or practice of court to the contrary." Our courts, both civil and criminal, have long recognized the importance of the voir dire process and have zealously guarded its integrity. Akins, 867 S.W.2d at 355. Since full knowledge of the facts which might bear upon a juror's qualifications is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make "full and truthful answers . . . neither falsely stating any fact nor concealing any material matter." Id. (citing 47 Am. Jur. 2d, Jury § 208 (1969)).

When a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may be made in a motion for new trial. After establishing that the challenge may be maintained, a defendant bears the burden of providing a prima facie case of bias or partiality. See State v. Carruthers, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003). When a juror willfully conceals (or fails to disclose) information on voir dire that reflects on the juror's lack of impartiality, a presumption of prejudice arises. Akins, 867 S.W.2d at 355. Failure to disclose information in the face of a material question reasonably calculated to produce the answer gives rise to a presumption of bias and impartiality. Id. The question must be material and one to which counsel would reasonably be expected to give substantial weight. Insignificant non-disclosures will not give rise to a presumption of prejudice. Furlough, 797 S.W.2d at 653. The test is whether a reasonable, impartial person would have believed the question, as asked, called for juror response under the circumstances. Akins, 867 S.W.2d at 356 n.13. Findings of fact made by the trial court are given the weight of a jury verdict. State v. Burgin, 668 S.W.2d 668, 669 (Tenn. Crim. App. 1984).

In the case under submission, we have discovered nothing in the record which casts doubt on the trial court's conclusion that this issue does not warrant a new trial. While Angel's knowledge of the Defendant's prior conviction should have been disclosed during the voir dire process, the evidence does not indicate that Angel intentionally withheld the information. The record reflects that Angel did not think that the general questions about knowing anything about the Defendant applied to him. The Defendant has failed to prove a prima facie case of bias or partiality because he failed to prove that Angel willfully concealed or failed to disclose information on voir dire "which reflects on the juror's lack of impartiality." Akins, 867 S.W.2d at 355. Furthermore, we do not think that bias has been shown. The State and the Defendant stipulated at the outset of trial that the Defendant had been indicted for the murder of Ralph Wilkey and that the victim, Mike Stafford, testified at the Defendant's trial for that murder. Accordingly, at the outset of trial, all the jurors knew information similar to what Angel knew about the Defendant. We find that the degree of Angel's information other than that presented at trial was minimal and agree with the trial court's finding that such

exposure did not prejudice the Defendant's case.

The Defendant contends that this case is similar to Akins, in which our Supreme Court granted the Defendant a new trial because a juror did not respond to questions about potential biases that were directed to the pool of potential jurors. The case under submission is distinguishable from Akins. The Akins Court noted that the juror "realized the significance of her experience yet failed to disclose them and then used them to counsel jurors about extraneous matters." Id. at 357. Unlike the juror in Akins, Angel explained that he did not think that the questions posed during voir dire pertained to him, and all of the jurors learned most of the information that Angel knew at the beginning of the Defendant's trial. Because the Defendant failed to show that Angel intentionally withheld information or that Angel's inclusion on they jury prejudiced his case, he is not entitled to relief on this issue.

The Defendant contends that the trial court, by allowing Juror Angel to testify at the hearing on the Defendant's motion for a new trial, violated Rule 606(b) of the Tennessee Rules of Evidence. That rule bars juror testimony regarding jury deliberations but permits testimony and affidavits pertaining to extraneous prejudicial information, outside influence, and agreed quotient verdicts. Tenn. R. Evid. 606(b). Additionally, Rule 606(b) bars testimony as to "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind." Id. The rule does not apply to testimony about voir dire and does not foreclose a challenge on the ground of proper affectum. Angel's statements pertained to his responses during the voir dire process. Therefore, the inquiries regarding his ability to serve as an impartial juror did not violate Tennessee Rule of Evidence 606(b), and the Defendant is not entitled to relief on this issue.

B. Lesser-Included Offense

The Defendant contends that the trial court erred in failing to instruct the jury on aggravated assault as a lesser-included offense of attempted first degree murder. Specifically, the Defendant argues that a jury instruction on aggravated assault was warranted because the indictment and arrest warrant recite allegations that constitute both aggravated assault and attempted first degree murder. He further argues that the evidence established at trial supports the lesser-included offense of aggravated assault. The State contends that aggravated assault is not a lesser-included offense of attempted first degree murder, and, therefore, the trial court properly declined to instruct the jury on aggravated assault.

The question of whether a given offense should be submitted to the jury as a lesser-included offense is a mixed question of law and fact. State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. Id. The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S .W.2d 314, 319 (Tenn. 1986)); see also Tenn. R. Crim. P. 30.

"In applying the lesser-included offense doctrine, three questions arise: (1) whether an offense is a lesser-included offense; (2) whether the evidence supports a lesser-included offense

instruction; and (3) whether an instructional error is harmless." State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002). In State v. Burns, 6 S.W.3d 453 (Tenn. 1999), our Supreme Court adopted a modified version of the Model Penal Code in order to determine what constitutes a lesser-included offense: An offense is a lesser-included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element elements establishing:
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest; or (c) it consists of
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Id. at 466-67.

Attempted first degree murder is the attempt to kill another when the defendant acts intentionally and with premeditation and deliberation. See Tenn. Code Ann.§§ 39-12-101; 39-13-202(a)(1) (2003). Assault requires bodily injury, fear of bodily injury, or offensive physical contact, none of which are essential to an attempt to murder. See Tenn.Code Ann. § 39-13-101(a) (2003). Aggravated assault is an assault accompanied by serious bodily injury or use of a deadly weapon. Tenn. Code Ann. § 39-13-102(a) (2003). Thus, aggravated assault and assault are not lesser-included offenses of attempted first degree murder under the Burns test because the statutory elements are different.[3] Burns, 6 S.W.3d at 466-67; Wayford Demonbreun, Jr. v. Ricky Bell, No. M2005-01741-CCA-R3-HC, 2006 WL 197106, at *5 (Tenn. Crim. App., at Nashville, Jan. 26, 2006), *no Tenn. R. App. P. 11 application filed*; State v. Joshua Lee Williams, No. W2000-01435-CCA-R3-CD, 2001 WL 721056, at *6 (Tenn. Crim. App., at Jackson, June 27, 2001), *perm. app. denied* (Tenn. Oct. 29, 2001); State v. Christopher Todd Brown, No. M1999-00691-CCA-R3-CD, 2000 WL 262936, at *2 (Tenn. Crim. App., at Nashville, Mar. 9, 2000), *perm. app. denied* (Tenn. Sept. 10, 2001). "If a lesser-included offense is not included in the offense charged, then an instruction should not be given, regardless of whether the evidence supports it." Burns, 6 S.W.3d

[3]Defense Counsel acknowledges that several opinions from this Court have held that, pursuant to the Burns test, aggravated assault is not a lesser-included offense of attempted first degree murder but argues that "the application of Burns was intended to be broader or that the analysis remains flawed." However, besides noting that our Supreme Court declined to address whether aggravated assault is a lesser-included offense of attempted first degree murder in State v. Yoreck, III, 133 S.W.3d 606 (Tenn. 2004), defense counsel fails to provide any legal support for his argument. Consequently, the Defendant is not entitled to relief on this issue. See Tenn. R. Crim. App. 10(b).

at 466-67.

Because aggravated assault is not a lesser-included offense of attempted first degree murder, the Defendant was not entitled to such a jury instruction. Under the Burns analytical framework, we cannot consider the Defendant's arguments that the evidence at trial supported an instruction of aggravated assault. See Id. Similarly, the law precludes us from addressing the Defendant's argument that his charging instrument and arrest warrant established allegations that constitute aggravated assault. Under Burns, the offense charged, not the actions described in the arrest warrant, determine what lesser-included offenses the trial court should give to the jury. Id.

The Defendant's indictment charged that:

> [The Defendant] did unlawfully, intentionally and with premeditation attempt to kill one Mike Stafford and in furtherance of the aforesaid attempt did shoot the said Mike Stafford with a firearm, to wit: a handgun, the aforesaid actions constituting a substantial step toward the commission of the offense of First Degree Murder . . . .

This indictment clearly charges the Defendant with attempted first degree murder and makes no allegations that the Defendant committed an aggravated assault. In this case, the jury was charged with attempted second degree murder and reckless endangerment. We conclude that the trial court did not err in failing to instruct the jury on aggravated assault, and the Defendant is not entitled to relief on this issue.

C. Mental Evaluation

The Defendant contends that the trial court erred when it did not obtain a mental evaluation of the Defendant to determine his competency to stand trial. The Defendant further argues that the mental evaluation that he had previously received served as an improper basis for the trial court's denial of his request for a mental evaluation, prior to trial in this case. The State counters that the evidence presented at the hearing on the motion for a mental evaluation failed to show that the Defendant was incompetent to stand trial, especially in light of the fact that the Defendant had received a mental evaluation in December of 1999, just months before the trial in this case. The trial court denied the Defendant's motion for a mental evaluation.

In his motion for a mental evaluation, Defense counsel alleged that the Defendant had received treatment for mental illnesses in the past and was presently in need of such treatment. At the hearing on the Defendant's motion, defense counsel testified that the Defendant was irrational and that he needed a mental evaluation. Assistant District Attorney General Pope testified that the Defendant made a similar motion in his previous murder trial, which occurred about a year ago, and that the mental evaluation revealed that the Defendant was competent and sane. The trial court noted that the Defendant appeared to be competent and sane at his prior trial. The trial court denied the Defendant's motion to receive a mental evaluation.

"When the accused is believed to be incompetent to stand trial, the criminal, circuit or general

sessions court judge may, upon his or her own motion or upon petition by the district attorney general or defense counsel and after a hearing, order the defendant to undergo a mental evaluation." State v. Rockie Smith, No. W1999-00814-CCA-R3-CD, 2000 WL 1664280 *5 (Tenn. Crim. App., at Jackson, Oct. 23, 2000), *no Tenn. R. App. P. 11 application filed*; Tenn. Code Ann. § 33-7-301(a)(1) (2003). The applicable test as to competency to stand trial is whether the accused has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. State v. Benton, 759 S.W.2d 427 (Tenn. Crim. App. 1988). Before the mental examination is ordered, there must be evidence sufficient to raise a question as to the accused's mental capacity. State v. West, 728 S.W.2d 32, 34 (Tenn. Crim. App. 1986). The decision to grant an evaluation is within the power of the trial judge, and this Court will not reverse a denial of a mental evaluation absent a clear showing of abuse of discretion on the part of the trial judge. State v. Rhoden, 739 S.W.2d 6, 16 (Tenn. Crim. App. 1987); State v. Lane, 689 S.W.2d 202, 204 (Tenn. Crim. App. 1984).

In the case under submission, the Defendant has not shown that the trial court abused its discretion when it denied his motion for a mental evaluation. First, we note that the record does not contain the prior mental evaluation, and we agree with the Defendant that the results of a mental evaluation conducted during a previous trial might not necessarily affect the outcome of his motion for a mental evaluation at a later date. Nonetheless, the evidence presented was not sufficient to raise a question as to the Defendant's mental capacity. The only allegations that the Defendant was presently unfit to stand trial consisted of defense counsel's observations that the Defendant was paranoid and irrational. The record lacks any evidence to refute the notion that the Defendant had sufficient ability to understand the proceedings against him and to assist in his defense. The record transmitted to this Court does not reveal any evidence, outbursts, or any other type of conduct which would cause the trial court to believe that the appellant was incompetent at the time of his trial. See State v. Rhoden, 739 S.W.2d 6, 17 (Tenn. Crim. App. 1987). Because the record does not reflect sufficient evidence to raise a question as to the Defendant's mental capacity, the trial court did not abuse its discretion when it denied the motion for a mental evaluation, and the Defendant is not entitled to relief on this issue.

D. Motions to Replace Counsel

The Defendant contends that the trial court erred when it denied his motion to discharge appointed counsel and his trial counsel's motion to withdraw because his defense counsel had a conflict of interest and because an acrimonious relationship and a complete breakdown of communications had developed between the Defendant and his trial counsel. The Defendant further argues that, because the trial court denied these motions, he recieved ineffective of counsel. The State counters that the trial court did not err when it denied these motions and that the Defendant received effective assistance of counsel.

1. Conflict of Interest

The Defendant contends that the trial court erred when it denied his trial counsel's motion to withdraw due to a conflict of interest based on his trial counsel's prior representation of State

witnesses. Specifically, the Defendant argues that, among other things, his trial counsel's conflict of interest "chilled" his trial counsel's ability to cross-examine the victim. The State counters that the Defendant's trial counsel's past representation of State witnesses did not prevent defense counsel from preparing a vigorous defense for the Defendant and that defense counsel did not need to withdraw because he effectively and zealously represented his client.

In a motion to withdraw, the Defendant's trial counsel notified the trial court that he had previously represented Victoria Bradford Cagle, a State witness, and Christy Littrell, the victim's step-daughter and Virginia Stafford's daughter, who was also on the State's witness list.[4] Due to these perceived conflicts of interest, the Defendant also moved to discharge his counsel. The Defendant's trial counsel filed another motion to withdraw, contending that he had previously represented the victim, Mike Stafford, on a charge of manufacturing marijuana and in a case in which Stafford pled no contest to the charge of improper influence of a juror. In his motion, defense counsel argued that Stafford should be cross-examined regarding this conviction for the purpose of impeaching the victim's credibility and that his former representation of Stafford would impede his ability to effectively cross-examine the victim. Defense counsel noted that he contacted the Board of Professional Responsibility,[5] which agreed that the Defendant's trial counsel should not represent the Defendant due to a conflict of interest.

At the hearing on this motion the following evidence was presented: Defense counsel testified that he represented the victim, Mike Stafford, on a manufacturing marijuana charge. He also described how he represented Victoria Bradford Cagle, Dennis Cagle's wife, on a ten-count forgery charge. He noted that Bradford was at the residence when Dennis Cagle and the Defendant left Cagle's house together to go pick up the victim. He explained that Bradford would be the "counter alibi" witness in this case and that he could not effectively cross-examine her. Defense counsel further testified that he represented and continues to represent Christy Littrell, Mike Stafford's step-daughter and Virginia Stafford's daughter, but acknowledged that Christy Littrell would not serve as a witness against the Defendant. He explained that the Defendant felt like these three apparent conflicts of interest would prevent the Defendant from receiving neutral, vigorous, and zealous representation. Assistant District Attorney General Pope argued that, because all of the charges that the State witnesses faced when defense counsel had represented them are part of the public record, defense counsel's prior representation of State witnesses did not prejudice the Defendant. The trial court ruled that:

> All right, I think this is the kind of thing that on close inspection, the Public Defender's office would have a problem in representing almost anybody, because if you go to stepchildren and extended relatives in almost every criminal case you've got sort of a circle of regulars, the same ones we see here in court all the time, you're going to have some connection in some way, so I don't think there's anything that

[4] We note that the record reveals that Christy Littrell did not testify at trial.

[5] The record does not contain any written opinion or statement from the Board of Professional Responsibility and does not describe in detail the opinion that the Board of Professional Responsibility provided.

was mentioned, that was mentioned to me that would be, that would be the kind of conflict that would require removal, so I deny the motion on all grounds.

The day before trial, defense counsel again asserted that his prior representation of Stafford on a jury tampering charge could hinder his ability to effectively cross-examine Stafford and to zealously represent the Defendant. The trial court inquired as to what details about the victim's prior conviction for tampering with a jury defense counsel needed to give to the jury in order to effectively impeach the victim's credibility as a witness. Defense counsel said: "I'm not worried about the actual facts on that conviction coming in, to be quite honest with you. I think just the fact of the conviction is really about as far as I was planning to take it."

At trial, the State asked Stafford if he pled no contest to improper influence of a jury, and Stafford said that defense counsel served as his lawyer in that case. The following dialogue ensued:

> [Defense Counsel]: Your Honor, the exact thing that I feared would happen just happened, that he said I was his lawyer on that prior conviction of jury tampering. I'm requesting a mistrial at this time based on that information, and at the least, a curative instruction to the jury.
> The Court: I don't think they picked up on that. I didn't even think much about it when it came up.
> General Pope: Your Honor, I don't know how that would be prejudicial at all.
> The Court: There's nothing prejudicial.

During cross-examination, defense counsel asked Stafford about his conviction for tampering with a jury. Stafford replied that he pled no contest and testified that he received the conviction for tampering with a jury because defense counsel had represented him and did not "work hard enough" to get him acquitted. Defense counsel again asked for a mistrial, and the following dialogue occurred:

> [Defense Counsel]: This is why I filed the pre-trial motions. I'm again asking for a mistrial.
> Trial Court: I'm not going to give you a mistrial. You know this guy's limited ability to respond to questions of that nature, so he's just trying to say what he thought, and you were asking him why and he brought it out--
> [Defense Counsel]: No, I didn't ask him why. I asked him - -
> The Court: But I don't see how that effects in any way your case. Okay, so motion denied.

Whether an accused is entitled to a substitution of counsel is a question which addresses itself to the sound discretion of the trial court. State v. Gilmore, 823 S.W.2d 566, 569 (Tenn. Crim. App. 1991). It is unquestioned that "an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest." State v. Thompson, 768 S.W.2d 239, 245 (Tenn. 1989). An actual conflict of interest is usually defined in the context of one attorney representing two or more

parties with divergent interests and exists where an attorney is "placed in a position of divided loyalties." State v. Tate, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995). A conflict "may exist anytime a lawyer cannot exercise his or her independent professional judgment free of 'compromising influences and loyalties.'" State v. Culbreath, 30 S.W.3d 309, 315 (Tenn. 2000) (citing Tate, 925 S.W.2d at 554). Unless a defendant can establish that his counsel "actively represented conflicting interests," he has not established the constitutional predicate for his claim. Id. at 350. To establish a claim based upon conflict of interests, the conflict must be actual and significant, not irrelevant or "merely hypothetical." Terrence B. Smith v. State, No. M2004-02366-CCA-R3-PC, 2005 WL 2493475, *5 (Tenn. Crim. App., at Nashville, Oct. 7, 2005), *perm. app. denied* (Tenn. Mar. 27, 2006). Generally, prejudice will only be presumed when the conflict of interest arises in cases involving representation of serial or co-defendants. Id. However, once the existence of an actual conflict has been shown, prejudice to the accused is presumed. Id. at *3.

Courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 160, 160 (1988). However, our Supreme Court has recognized that the opinions from the Board of Professional Responsibility are not binding on this Court since they "do not have the force of law." State v. Jones, 726 S.W.2d 515, 519 (Tenn. 1987). The disciplinary rules govern lawyer conduct within the profession, but they do not fully equate with the body of law governing courts, trials and the administration of the justice system. Id. However, the "'Code often provides guidance in our determinations.'" Tate, 925 S.W.2d at 550 (quoting State v. Willie Claybrook, No. 3, 1992 WL 17546, *11(Tenn. Crim. App., at Jackson, Feb. 5, 1992), *perm. app. denied* (Tenn. May 4, 1995).

In the case under submission, the trial court did not abuse its discretion when it denied the motions to remove counsel due to an alleged conflict of interest. The trial court determined that defense counsel did not actively represent conflicting interests, and there is nothing in the record to contradict the trial court's finding. Defense counsel conceded that the only information about Stafford that the Defendant wanted the jury to hear was that Stafford had been convicted of tampering with a jury. This evidence was heard by the jury, presumably for the jury to consider in assessing Stafford's credibility. Defense counsel acknowledged that he did not need to provide the jury with details about the victim's prior conviction. The Defendant has failed to establish that his counsel had a conflict of interest and that he was prejudiced due to any alleged conflicts of interest. The Defendant is not entitled to relief on this issue.

2. Acrimonious Relationship

The Defendant contends that the trial court erred when it denied his motion to discharge appointed counsel due the acrimonious relationship and the complete breakdown of communication that developed between them. The State contends that the trial court did not err when it denied this motion. The record reflects that, a few weeks before his trial began, the Defendant filed a motion asking the court to relieve counsel from further representation of the Defendant because irreconcilable differences and a complete breakdown of communications had arisen between the Defendant and his trial counsel. The day before the trial began, defense counsel informed the trial

court that a personality conflict had developed between him and the Defendant but that this conflict would not affect defense counsel's ability to represent the Defendant.

Both the United States and Tennessee Constitutions guarantee an indigent criminal defendant the right to assistance of appointed counsel at trial. See U.S. Const. amend VI; Tenn. Const. art. I § 9. However, the Sixth Amendment's protection includes no guarantee of the right to a meaningful relationship between an accused and his counsel, whether counsel be appointed or retained. See State v. Carruthers, 35 S.W.3d 516, 546 (Tenn. 2000). Neither the Federal nor State constitutions requires that an indigent defendant receive counsel of his choice, or counsel with whom the defendant enjoys "special rapport, confidence, or even a meaningful relationship." Id. The baseline guarantee is one of effective counsel, not preferred counsel. Id.

With respect to motions to withdraw, the trial court may, upon good cause shown, permit the withdrawal of an attorney appointed to represent an indigent defendant. Tenn. Code Ann. § 40-14-205(a) (2003). When a defendant seeks to substitute counsel, he or she has the burden of establishing to the trial judge's satisfaction that "(a) the representation being furnished by counsel is ineffective, inadequate, and falls below the range of competency expected of defense counsel in criminal prosecutions, (b) the accused and appointed counsel have become embroiled in an irreconcilable conflict, or (c) there has been a complete breakdown in communications between them." State v. Gilmore, 823 S.W.2d 566, 568-69 (Tenn. Crim. App. 1991). The trial court has wide discretion in matters regarding the appointment and relief of counsel, and its action will not be set aside on appeal unless a plain abuse of that discretion is shown. State v. Rubio, 746 S.W.2d 732, 737 (Tenn. Crim. App. 1987). Further, the defendant must demonstrate that he was prejudiced by the trial court's denial of the motion to withdraw. See State v. Branam, 855 S.W.2d 563, 566 (Tenn. 1993). This Court has previously held that the fact that a defendant chose not to cooperate with competent appointed counsel does not entitle him to the appointment of other counsel. Rubio, 746 S.W.2d at 736. It been was noted that the "willful refusal of a defendant to cooperate with his attorney is not imputable to either the State or defense counsel." State v. McClennon, 669 S.W.2d 705, 707 (Tenn. Crim. App. 1984). The States's constitutional obligation has been fulfilled by the appointment of counsel, and there is no constitutional requirement that the court continue to appoint additional counsel "until one is appointed with whom the defendant might elect to cooperate." Id.

In the case under submission, the trial court did not abuse its discretion when it denied the Defendant's motion for the appointment of substitute counsel. The Defendant contends that he was forced to go to trial with counsel that had asserted that the Defendant was paranoid and irrational. However, defense counsel made these assertions in order to assist the Defendant by advising the trial court that the Defendant needed a mental evaluation. The record reflects that counsel was willing to work with the Defendant to address any conflicts or communication problems that had developed between them. Defense counsel did not state that he could no longer represent the Defendant due to the Defendant's offensive personality. In fact, defense counsel told the trial court that he could represent the Defendant despite the conflicts that had arisen between them. Accordingly, in our view, the Defendant has failed to meet his burden of establishing that he had a complete breakdown in communications with appointed counsel or that he and his appointed counsel had become

embroiled in an irreconcilable conflict. Furthermore, the Defendant failed to establish that he was prejudiced by the trial court's denial of the motion to withdraw. Therefore, the Defendant is not entitled to relief on this issue.

3. Ineffective Assistance of Counsel

The Defendant contends that his right to counsel and effective representation was abridged because the trial court denied his motion to withdraw. Specifically, he asserts that the alleged animosity and distrust that arose between the Defendant and his trial counsel violated his right to effective representation. The State counters that the Defendant failed to prove that his trial counsel was ineffective in any way and that the record demonstrates that Counsel's representation of the Defendant was well within the range of competence demanded of criminal defense attorneys.

This Court has consistently "warned defendants and their counsel of the dangers of raising the issue of ineffective assistance of trial counsel on direct appeal because of the significant amount of development and fact finding such an issue entails." Kendricks v. State, 13 S.W.3d 401, 405 (Tenn. Crim. App. 1999). Raising the issue of ineffective assistance of counsel on direct appeal is "a practice fraught with peril." State v. Thompson, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997). The defendant runs the risk of having the issue resolved "'without an evidentiary hearing which, if held, might be the only way that harm could be shown-a prerequisite for relief in ineffective trial counsel claims.'" Id. (quoting Jimmy Wayne Wilson v. State, No. 909, 1991 WL 87245, at *6 (Tenn. Crim. App., at Knoxville (Tenn.Crim.App., at Knoxville, May 29, 1991) *no Tenn. R. App. 11 application filed*).

Nonetheless, our Supreme Court has stated that claims of ineffective assistance of counsel may be presented on direct appeal and that the reviewing court must apply the same standard as utilized for such claims as in post-conviction proceedings. See Burns, 6 S.W.3d at 461 n.5. When a defendant seeks relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Should the defendant fail to establish either factor, he is not entitled to relief. Our Supreme Court described the standard of review as follows:

> Because a [defendant] must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the defendant is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but

unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to tactical decisions of counsel applies only if the choices are made after adequate preparation for the case. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

On appeal, the findings of fact made by the trial court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). The burden is on the Defendant to show that the evidence preponderates against those findings. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). When reviewing the application of law to those factual findings, however, our review is de novo, and the trial court's conclusions of law are given no presumption of correctness. Fields v. State, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In the case under submission, the Defendant has failed to prove by clear and convincing evidence that he received ineffective assistance of counsel. As previously stated, the record reveals that his defense counsel at trial felt that he could provide the Defendant with effective representation despite any previous conflicts that had arisen between himself and the Defendant. In his own brief, the Defendant acknowledges that his trial counsel was experienced and competent. The Defendant provides no specific examples of how the trial court abridged his right to effective assistance of counsel by denying his motion to withdraw. Furthermore, the Defendant has failed to show how any alleged ineffective assistance of counsel prejudiced his case. The Defendant is not entitled to relief on this issue.

E. References to Prior Conviction

The Defendant contends that the trial court erred when it disclosed to the jury that the Defendant was previously indicted for the homicide of Ralph Wilkey. Specifically, the Defendant argues that the prejudicial effect of this evidence outweighed its probative value. He contends that the trial court screened people who already knew of the Defendant's prior conviction due to the prejudicial effect of such information. The State counters that the Defendant waived this issue because he failed to file a motion in limine to prevent any references to the Defendant's prior trial, failed to contemporaneously object at trial to such references, and actually agreed to stipulate that the Defendant was indicted for the murder of Ralph Wilkey and that Stafford testified as a witness for the State at that murder trial.

Under Tennessee law, relevant evidence is generally admissible unless its probative value is substantially outweighed by its prejudicial effect. See Tenn. R. Evid. 402 and 403. Evidence is "relevant" if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Tennessee Rule of Evidence 404(b) states that evidence of "other crimes, wrongs or acts is not admissible to prove the character of a person or to show action in conformity with the character trait" but that such evidence "may . . . be admissible for other purposes." The rule includes the following procedures for determining the admissibility of 404(b) evidence:

(1) The court upon request must hold a hearing outside the jury's presence;
(2)The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). The safeguards in Rule 404(b) ensure that defendants are not convicted for charged offenses based on evidence of prior crimes, wrongs or acts. State v. James, 81 S.W.3d 751, 758 (Tenn. 2002). Where the procedures "are substantially followed, the trial court's decision will be given great deference and will be reversed only for an abuse of discretion." Id. at 759; see also State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). However, the decision of the trial court is afforded no deference, and our review is de novo, if the procedural requirements are not substantially followed. Id.

Traditionally, courts have not permitted the State to establish through acts of prior misconduct any generalized propensity on the part of a defendant to commit crimes. See, e.g., State v. Teague, 645 S.W.2d 392 (Tenn. 1983). Most authorities suggest that trial courts take a "restrictive approach of 404(b) . . . . because 'other act' evidence carries a significant potential for unfairly influencing a jury." Neil P. Cohen et al., Tennessee Law of Evidence § 4.04[8][e] (4th ed. 2000). A jury cannot be allowed to convict a defendant for bad character or any particular disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994) (citing Anderson v. State, 56 S.W.2d 731 (Tenn. 1933)). In those instances where the prior conduct or acts are similar to the crimes on trial, the potential for a prejudicial result increases. State v. Mallard, 40 S.W.3d 473, 488 (Tenn. 2001).

Generally, only in an exceptional case will another crime, wrong, or bad act be relevant to an issue other than the accused's character. State v. McCary, 922 S.W.2d 511, 513 (Tenn. 1996). In making its decision regarding the admissibility of the testimony, the trial court must first determine if the offered testimony is relevant to prove something other than the Defendant's character. Id. at 514. The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. Id. Nevertheless, evidence of a defendant's prior crimes, wrongs or acts may be admissible where it is probative of material issues other than conduct conforming with a character trait. Tenn. R. Evid. 404(b). Such material issues include "identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake." Tenn R. Evid. 404, Advisory Comm'n Comm.

Unlike Federal Rule of Evidence 404(b), which generally bars evidence of other crimes, wrongs, or acts, the corresponding rule in Tennessee does not specifically enumerate the purposes for which such evidence may be offered. The issues to which evidence of other acts may be relevant were not listed by the Advisory Commission so that lawyers and judges would "use care in identifying the issues to be addressed by the Rule 404(b) evidence." Neil P. Cohen, et al., Tennessee Law of Evidence § 404.6, at 169 n.457 (4th ed. 2000). Therefore, in every case in which evidence

of other crimes, wrongs, or acts is offered, the trial judge should carefully scrutinize the relevance of the evidence and the reasons for which it is being offered.

In the case under submission, the trial court did not hold a hearing outside the presence of the jury to determine if the stipulation and all evidence regarding the Wilkey case should be entered into evidence. However, the Defendant did not object to the introduction of such evidence. There is clear and convincing evidence in the record that the Defendant was indicted for the homicide of Ralph Wilkey. The Defendant stipulated that he was indicted for Ralph Wilkey's homicide and that Stafford was a State witness at the Defendant's trial for the Wilkey Homicide. The trial court presiding in this case also presided in the case in which Ralph Wilkey was a victim of homicide for which the Defendant was convicted.

Based on our review of the record, the trial court did not abuse its discretion when it allowed into evidence information about the trial for charges brought against the Defendant for the homicide of Ralph Wilkey. We conclude that the Defendant's indictment for the homicide of Ralph Wilkey was relevant to show the Defendant's motive for attempting to murder the victim. The explanation of the pending charge against the Defendant carried great probative value because it provided a motive for the Defendant to attempt to murder the victim. Therefore, the Defendant's indictment for the homicide of Ralph Wilkey had probative value that was not outweighed by its prejudicial effect. The Defendant contends that the State could have established its case without mentioning that the prior case was a homicide or murder case. However, a pending homicide charge, with the severe penalties for conviction, would logically provide a stronger motive to kill a State witness than most other types of pending criminal charges. Therefore, the trial court did not abuse its discretion when it allowed testimony about the Defendant's prior homicide indictment and testimony about the Wilkey trial into evidence for the purpose of proving a motive for the Defendant's attempt to murder Mike Stafford. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing authorities and reasoning, the judgment of the trial court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE